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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1969

NO. 482

MARYLAND NATIONAL INSURANCE COMPANY, A CORPORATION, AND CARL BROOKS,

Appellants,

VERSUS

THE SEVENTH JUDICIAL DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA, AND ALL OF THE JUDGES THEREOF,

Appellees.

Appeal from the Supreme Court of the State of Oklahoma

APPENDIX OF JURISDICTIONAL STATEMENT

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King Law Brief Leonhardt Bldg., Oklahoma City — CE 5-2969

APPENDIX A

STATUTES AND CONSTITUTIONAL

1965 Oklahoma Bail Bond Act 59 O.S. 1969 Supp., Secs. 1301-1340:

CHAPTER 33. BAIL BONDSMEN AND RUNNERS (NEW)

Sec.
1301 Definitions
1302 Powers of commissioner
1303 License required; acts exempt; individual license; application; election as to place of business
1304 Expiration date
1305 Contents of application; fee
1306 Cash bondsman; professional bondsman
1307 Runners
1308 Examination; fee
1309 Renewal licenses
1310 Denial; suspension or revocation of licenses
1311 Violation of laws relating to bonds; notice and hearing
1312 Appeals
1313 Prohibited acts
1314 Written receipt for collateral; semi-annual reports
1315 Powers of clerks prohibited as bondsmen
1316 Signing of bonds
1317 Insurers to report list of bondsmen; notice of termination of appointment
1318 Discontinuance of writing bail bonds; notice
1319 Appointment of runners
1320 Registration of licenses; filing of copy of appointment
1321 Qualifications of sureties
1322 Affidavit as to undertaking
1323 Cash bond
1324 Property bond
1325 Substitution of bail
1326 Bonds; amounts; irregularities; etc.
1327 Surrender of defendant prior to breach
1328 Procedure for surrender of defendant
1329 Arrest
1330 Forfeiture of bond
1331 Property bond; forfeiture
1332 Notice of forfeiture; motion to set aside
1333 Enforcement of liability
1334 Bail on personal recognizance
1335 Penalty for incurring forfeiture; failing to comply with personal recognizance
1336 Penalty
1337 Effective date; disposition of fees and moneys
1338 Use of telephone

1300 Notice to sell.
1301 Definitions.

Sections 1301 to 1305 amended by Laws 1961, c. 104, effective January 1, 1962. See § 1111.

Effective conference, see note to § 1111 of this title.

§ 1301. Definitions

The following words when used in this act shall have the following meanings:

(1) This act shall only apply to residents of Indian Country, the punishment of which ~~shall not exceed~~ a fine of Twenty Dollars ($20.00) for not to exceed [illegible] days in jail.

(2) Commissioner shall mean the insurance commissioner of the State of Oklahoma.

(3) [illegible] shall mean the district or superior court clerk.

(4) Agency shall mean any department, bureau or other entity designated which was qualified generally to transact surety business and specifically to transact bail bond business in this state.

(5) Bail bondsman shall mean a surety bondsman, professional bondsman, property bondsman or a cash bondsman as hereinafter defined.

(6) Surety bondsman shall mean any person who has been approved by the commissioner and appointed by an agency to execute bail bonds in connection with judicial proceedings and who executes such bail bonds for a premium.

(7) Professional bondsman shall mean any person who has been approved by the commissioner and who pledges cash or approved securities as security for a bail bond in connection with a judicial proceeding and charges and receives money for his services.

(8) Property bondsman shall mean any person who has been approved by the commissioner and who pledges real property as security for a bail bond in connection with a judicial proceeding and charges and receives money for his services.

(9) Cash bondsman shall mean any person who has been approved by the commissioner and who deposits cash as security for a bail bond in a judicial proceeding and charges and receives money for his services.

(10) Runner shall mean a person employed by a bail bondsman for the purpose of soliciting bail bond business or presenting to the court or the court clerk bail bonds executed by a bail bondsman for the purpose of obtaining approval of the bail bond or the release of the defendant on bail bond. The term shall not include an employee whose duties are limited to the clerical preparation of bail bonds and who does not solicit bail bond business.

(11) Bail bond or bail bonds shall mean any bond in this act shall mean a [illegible] bond executed by a surety bondsman to secure the appearance of a defendant in court when required, or to surrender in execution of judgment, or to pay a fine and costs, not to exceed the sum of Twenty Dollars ($20.00) and costs, in lieu of appearance of the defendant in court.

Title of Act

An Act relating to bail bondsmen; defining terms; designating commissioner of insurance as administrator of act regulating license for bail bondsmen; prescribing requirements for license; authorizing denial, renewal, suspension or revocation of license; requiring written examination; authorizing appeals; providing certain service requirements; requiring bail bond records; fixing amount for certain licenses; specifying terms of undertakings; providing for surrender of defendant before forfeiture of bond; requiring notice of hearing on breach of undertaking; making undertaking a lien on property described; allowing personal recognizance bond; fixing fees; providing for penalties; making provisions severable; setting effective date and repealing conflicting laws. Laws 1965, c. 181.

§ 1302. Powers of commissioner

(1) The commissioner shall have full power and authority to administer the provisions of this act, which regulates bail bondsmen and runners and to that end to adopt and promulgate rules and regulations to enforce the purposes and provisions of this act. The commissioner may employ and discharge such employees, examiners, counsel, and such other assistants as shall be deemed necessary, and he shall prescribe their duties and their compensation shall be the same as other state employees receive for similar services.

(2) Any written instrument purporting to be a copy of any action, proceeding or finding of fact by the commissioner, or any record of the seal of his office shall be accepted in all the courts of this state as prima facie evidence of the contents thereof. Laws 1965, c. 181, § 2.

§ 1303. License required—Acts exempt—Individual license—Applications—Election as to place of business

(a) No person shall act in the capacity of a bail bondsman or runner or perform any of the functions, duties or powers prescribed for bail bondsmen or runners under the provisions of the act unless that person shall be qualified and licensed as provided in this act. Provided, however, that none of the provisions of this section shall prohibit any individual or individuals from (1) pledging real or other property as security for a bail bond for himself or another in criminal proceedings who does not receive or is not promised a fee, charge or reward therefor, provided such person shall not be permitted to make more than four bonds per year or (2) executing any bail bond for an insurance company, a bail bond surety authorized, licensed or known such insurance company or any duly authorized agent thereof, provided such person shall not be permitted to make more than four bonds per year.

The applicant shall apply in writing on forms prepared and supplied by the commissioner, and the commissioner may propound any reasonable interrogatories to an applicant for a license under this chapter or on any renewal thereof, relating to his qualifications, residence, prospective place of business and any other matters which in the opinion of the commissioner are deemed necessary or expedient in order to protect the public and ascertain the qualifications of the applicant. The commissioner may also conduct any reasonable inquiry or investigation he deems fit relative to the determination of the applicant's fitness to be licensed or to continue to be licensed.

The failure of the applicant to secure approval of the commissioner shall not preclude him from applying for examination at a later date, but no application shall be considered by the commissioner within three months subsequent to the date upon which the commissioner denied the last application.

Every landsman as provided under the terms of this act shall file with the commissioner an election of the county or counties of which he shall be licensee as a landsman and the commissioner shall certify those counties in which such landsman is eligible to be licensed. It shall be a requirement of this act that any such landsman shall be constantly accessible in those counties wherein the landsman is qualified to be licensed. Accessibility as herein required shall mean that the landsman must have a duly authorized agent within the county with authority to make and execute a bail bond. It is further provided that in any county not having a licensed landsman authorized to do business within said county, or where a licensed landsman is not accessible within the meaning of the act then and in that event upon determination of any district judge of such court the court having jurisdiction shall allow and fix bail as otherwise provided by law. Laws 1963, c. 181, § 3.

[Section 1301.1 of this title]

§ 1301. Expiration date

All licenses issued shall expire annually at 12:00 o'clock midnight on the last day of September, unless revoked or suspended prior thereto by the commissioner or upon notice given by the commissioner that the person so licensed or any surety has canceled the surety's authority to act for such licensee or surety.

Laws 1963, c. 181, § 3.

§ 1303. Contents of application — Fee

The application for license, in addition to the matters set out in Section 3 of this act, to agent of a bail landsman must affirmatively show: Applicant is a natural person who has attained the age of twenty-one years of good character and reputation, not previously convicted of a felony in a court of the United States or the State of Oklahoma or of the state in which he resides for the past two years, actually engaged in the bail bond business, and by knowledge, experience or instruction in the fundamental business of bail bonds is skilled in the bail bond business, and has been employed by a licensed bail bondsman for a period of not less than one year within the last two years, or has been employed by a licensed bail bondsman in writing bail bonds for a period of not less than one year of the last five years, or is already licensed to write bail bonds in the state of Oklahoma. Applicant shall furnish to the commissioner a bond for $1,000.00 with good and sufficient surety, conditioned upon the faithful performance of his duties as such agent, and a certificate of good character signed by not less than five reputable persons who have known the applicant for a period of not less than two years, and who are not related to the applicant by blood or marriage. The applicant shall be required to pay an application fee of [illegible] dollars ($) which shall be paid to the commissioner at the time of filing the application. Laws 1963, c. 181, § 3.

§ 1306 Cash bondsman—Professional bondsman

(c) The fee for such examination shall be Ten Dollars ($10.00) in addition to the license fee heretofor provided and shall be submitted with the application. Results will be mailed applicant within thirty days.

(d) The failure of an applicant to pass an examination shall not preclude him from taking subsequent examinations; provided, however, that, at least three months must intervene between examinations. Laws 1965, c. 184, § 8.

§ 1309. Renewal licenses

(1) A renewal license shall be issued by the commissioner to a licensee who has continuously maintained same in effect, without further examination, upon payment of a renewal fee of Fifty Dollars ($50.00) for bail bondsman and Twenty Dollars ($20.00) for runner. Such licensee shall in all other respects be required to comply with and be subject to the provisions of this act. After the receipt of such licensee's application for renewal the current license shall continue in effect until the renewal license is issued or denied for cause.

(2) In case of renewal of a professional bondsman license, application shall also provide a current CPA statement of worth as heretofor provided and any material change of condition in applicant's original application affecting his qualifications. Laws 1965, c. 184, § 9.

§ 1310. Denial, suspension or revocation of licenses

The commissioner may deny, suspend, revoke or refuse to renew any license issued under this act for any of the following causes:

(1) For any cause for which issuance of the license could have been refused had it then existed and been known to the commissioner.

(2) Violation of any laws of this state relating to bail, in the course of dealing under the license issued him by the commissioner.

(3) Material misstatement, misrepresentation or fraud in obtaining the license.

(4) Misappropriation, conversion or unlawful withholding of moneys belonging to insurers or others and received in the conduct of business under the license.

(5) Conviction of a felony.

(6) Fraudulent or dishonest practices in the conduct of business under the license.

(7) Willful failure to comply with, or willful violation of any proper order, rule, or regulation of the commissioner.

(8) When, in the judgment of the commissioner, the licensee has, in the conduct of affairs under the license, demonstrated incompetency, or untrustworthiness, or conduct or practices rendering him unfit to carry on the bail bond business or making his continuance in such business detrimental to the public interest, or that he is no longer in good faith carrying on the bail bond business, or that he is guilty of rebating, or offering to rebate, or unlawfully dividing, or offering to divide, his commissions in the case of limited surety agents, or premiums in the case of professional bondsmen; and for such reasons as found by the commissioner to be a source of detriment, injury or loss to the public. Laws 1965, c. 184, § 10.

§ 1311. Violation of law's relating to bonds—Notice and hearing

If, after investigation, it shall appear to the satisfaction of the commissioner that a bail bondsman or runner has been guilty of violating any of the laws of this state relating to bail bonds, the commissioner shall, upon thirty days notice in writing to the bail bondsman or runner and to the insurer represented by him of a surety bondsman, accompanied by a copy of the charges of the unlawful conduct of such bail bondsman or runner, suspend the license of such bail bondsman or runner, unless on or before the expiration of the thirty days the bail bondsman or runner shall file with the commissioner a written answer to the charges. If, however, the bail bondsman or runner shall file written answer

denying the charges within the time specified, the commissioner shall call a hearing within a reasonable time for the purpose of taking testimony and evidence on any issue of fact made by the charges and answer. The commissioner shall give notice to such bail bondsman or runner and to the insurer represented by him, if a surety bondsman, of the time and place of the hearing. The parties shall have the right to produce witnesses, and to appear personally and by counsel. If, upon such hearing the commissioner shall determine that the bail bondsman or runner is guilty as alleged in said charges, he shall thereupon revoke the license of the bail bondsman or runner or suspend him for a definite period of time to be fixed in the order of suspension, not to exceed the maximum time of one year. Laws 1965, c. 181, § 11.

Library references

Physicians and Surgeons, Key No. 10.

C.J.S. Physicians and Surgeons §§ 31-35.

§ 1312. Appeals

Any applicant for license as bail bondsman or runner whose application has been denied or whose license shall have been so suspended or revoked, or renewal thereof denied, shall have the right of appeal from such final order of the commissioner thereon by filing a petition in the district court of Oklahoma County or to the district court of the county of applicant's residence. Such judicial review shall be as prescribed by 75 O.S.Supp. 1963, §§ 318 through 324, inclusive. Laws 1965, c. 181, § 12.

§ 1313. Prohibited acts

No bail bondsman or runner shall:

(a) Suggest or advise the employment of or name for employment any particular attorney to represent his principal.

(b) Pay a fee or rebate or give or promise anything of value to a jailer, policeman, peace officer, committing magistrate, or any other person who has power to arrest or hold in custody, or to any public official or public employee in order to secure a settlement, compromise, remission or reduction of the amount of any bail bond or the forfeiture thereof.

(c) Pay a fee or rebate or give anything of value to an attorney in bail bond matters, except in defense of any action on a bond.

(d) Pay a fee or rebate or give or promise anything of value to the principal or anyone in his behalf.

(e) Participate in the capacity of an attorney at a trial or hearing of one on whose bond he is surety.

(f) Accept anything of value from a principal except the premium, provided that the bondsman shall be permitted to accept collateral security or other indemnity from the principal which shall be returned upon final termination of liability on the bond. Such collateral security or other indemnity required by the bondsman must be reasonable in relation to the amount of the bond.

(g) Solicit business in or about any place where prisoners are confined. Laws 1965, c. 181, § 13.

§ 1314. Written receipt for collateral—Semi-annual reports

When a bail bondsman accepts collateral he shall give a written receipt for same and this receipt shall give in detail a full description of the collateral received. A copy of said receipt shall be attached to and filed with the undertaking by affidavit. Every licensed bondsman within this act shall file semi-annually with the commissioner and on forms supplied by the commissioner

(a) A list of every bond filed, type and terms of bond, whether released or revoked during the past six months showing the court, judge, and county, the style and number of the case and the charge. Showing further the amount and description of security thereon, original or substitute, and if real property, the legal description.

(b) Showing further on all bonds released, the date, and reason whether surrendered or by adjudication. Showing further on all bonds revoked, the reasons of revocation, the disposition thereof, whether unpaid, or satisfied, along with any other pertinent information. Said records shall be maintained by the commissioner as public records and made available on demand to any interested person. Laws 1965, c. 184, § 14.

§ 1315. Persons or classes prohibited as bondsmen

The following persons or classes shall not be bail bondsmen or runners and shall not directly or indirectly receive any benefits from the execution of any bail bond; jailers; police officers, committing magistrates, justices of the peace, municipal or magistrate court judges, sheriffs, deputy sheriffs and constables, any person having the power to arrest or having anything to do with the control of federal, state, county or municipal prisoners. Laws 1965, c. 184, § 15.

§ 1316. Signing of bonds

A bail bondsman shall not sign nor countersign in blank any bond, nor shall he give a power of attorney to, or otherwise authorize, anyone to countersign his name to bonds, unless the person so authorized is a licensed bondsman directly employed by the bondsman giving such power of attorney. Laws 1965, c. 184, § 16.

§ 1317. Insurers to report list of bondsmen—Notice of termination of appointment

Every insurer shall annually, prior to the last day of September furnish the commissioner a list of all surety bondsmen appointed by it to write bail bonds on its behalf. Every such insurer who subsequently appoints a surety bondsman in the state, shall give notice thereof to the commissioner along with a written application for license for said bondsman. All such appointments shall be subject to the issuance of a license to such surety bondsman.

An insurer terminating the appointment of a surety bondsman shall file immediately written notice thereof with the commissioner, together with a statement that it has given or mailed notice to the surety bondsman. Such notice filed with the commissioner shall state the reasons, if any, for such termination. Laws 1965, c. 184, § 17.

§ 1318. Discontinuance of writing bail bonds—Notice

Any bail bondsman who discontinues writing bail bonds during the period for which he is licensed shall notify the clerks of the district courts and the sheriffs with whom he is registered and return his license to the commissioner for cancellation within thirty days from such discontinuance. Laws 1965, c. 184, § 18.

§ 1319. Appointment of runners

Every person duly licensed as a bail bondsman may appoint as runner any person who holds or has qualified for a runner's license. Each bail bondsman must, on or before the last day of September of each year, furnish to the commissioner a list of all runners appointed by him. Each such bail bondsman who, subsequent to the filing of this list, appoints additional persons as runners shall immediately file written notice with the commissioner of such appointment.

A bail bondsman terminating the appointment of a runner shall file immediately, written notice thereof with the commissioner, together with a statement that he has given or mailed notice to the runner. Such notice filed with the commissioner shall state the reasons, if any, for such termination. Information so furnished the commissioner shall be privileged and shall not be used as evidence in any action against the bail bondsman. Laws 1965, c. 184, § 19.

§ 1320. Registration of license—Filing of copy of appointment

No bail bondsman shall become a surety on an undertaking unless he has first registered his license in the office of the sheriff and with the clerk of the district court in the county in which the bondsman resides and he may then become surety in any other county upon presenting to the official required to approve the sufficiency of bail, a certificate of such registration. A surety bondsman shall also file a certified copy of his appointment by power of attorney from each insurer which he represents as agent with each of said officers. Registration and filing of certified copy of renewed power of attorney shall be performed annually by the last day of September. The clerk of the district court and the sheriff shall not permit the registration of a bail bondsman unless such bondsman is currently licensed by the commissioner under the provisions of this act. Laws 1965, c. 184, § 20.

Library references
Physicians and Surgeons § 11(1) et seq.
C.J.S. Physicians and Surgeons § 16 et seq.

§ 1321. Qualifications of sureties

Each and every surety for the release of a person on bail shall be qualified as:

(1) An insurer and represented by a surety bondsman or bondsmen; or

(2) A professional bondsman properly qualified and approved by the commissioner; or

(3) A cash bondsman; or

(4) A property bondsman; or

(5) A natural person who has reached the age of twenty-one years, a citizen of the United States and a bona fide resident of Oklahoma for a period of six months immediately last past and who holds record title to property in Oklahoma, cash or other things of value, acceptable to the proper authority approving the bail bond. Laws 1965, c. 184, § 21.

Library references
Physicians and Surgeons, Key No. 6(1).
C.J.S. Physicians and Surgeons §§ 16, 23.

Library references
Witnesses, Key No. 196.
C.J.S. Witnesses § 254 et seq.

§ 1322. Affidavit as to undertaking

Every "bondsman" shall file with the undertaking an affidavit stating whether or not he or anyone for his use has been promised or has received any security or consideration for his undertaking, and if so, the nature and description of security and amount thereof, and the name of the person by whom such promise was made or from whom such security or consideration was received. Any wilful misstatement in such affidavit relating to the security or consideration promised or given shall render the person making it subject to the same prosecution and penalty as one who commits perjury. An action to enforce any indemnity agreement shall not lie in favor of the surety against such indemnitor, except with respect to agreements set forth in such affidavit. In an action by the indemnitor against the surety to recover any collateral or security given by the indemnitor, such surety shall have the right to retain only such security or collateral as is mentioned in the affidavit required above. Laws 1965, c. 184, § 22.

§ 1323. Cash bond

When the defendant has been admitted to bail, he, or another in his behalf, may make a cash bond by depositing with an official authorized to take bail, a sum of money, or nonregistered bonds of the United States, or of the state, or of any county, city or town within the state, equal in market value to the amount of such bail, together with his personal undertaking and an undertaking of such other person, if the money or bonds are deposited by another. Upon delivery to the official, in whose custody the defendant is, of a certificate of such deposit, he shall be discharged from custody in the cause. Laws 1965, c. 184, § 23.

Library references

Bail, Key No. 73.
Injunction, Key No. 89(5).

C.J.S., Bail §§ 52, 53.
C.J.S., Injunctions § 123 et seq.

§ 1324. Property bond

Where the undertaking is a property bond, whether posted by a bail bonds man, the defendant personally, or by any other person, said bond shall give the legal description of the property, the assessed valuation, the amount of encumbrances, if any, and the status of the legal title, all by affidavit. Any property located within the county wherein the bail is allowed, that is subject to execution shall be accepted for security on a property bond for the market value of the property. Market value is defined to be four times the assessed valuation of the property as recorded on the tax rolls, less any encumbrances thereon, provided, that homesteads may be accepted as security for appearance if the homestead exemption is waived in writing. Such waiver shall be verified and executed by the spouse, if any. The property listed upon any property bond or bonds will be security on said bonds up to the aggregate amounts as follows:

(A) In the event of bonds written by a licensed property bondsman, four times the market value of said property;

(B) All other property bonds; in the face amount of the market value of said property.

The court clerk, upon the approval of a property bond, shall forthwith file a certified copy of said bond in the office of the county clerk in which the property is located, transmitting to the county clerk the filing fee which will be paid by the person executing said bond. The county clerk shall index said bond upon his tract index as a lien against said described property and such bond shall be a lien upon the real estate described thereon until a certificate discharging said bond shall be filed in the office of the county clerk. Said lien shall be superior to any conveyance, incumbrance or lien thereafter pertaining to said property. When said bond shall have been discharged, the clerk of said court shall issue to the surety a certificate of discharge describing the bond and the real property, which shall, upon filing with the county clerk and the payment of the filing fee, be recorded in the tract index. An abstract company preparing an abstract upon such real estate, shall be required to list in said abstract only the undischarged liens and shall not list any discharged liens. Laws 1965, c. 184, § 24.

Library references

Bail, Key No. 57 et seq.
Physicians and Surgeons, Key No. 6(1) et seq.

C.J.S. Bail § 57 et seq.
C.J.S. Physicians §§ 10, 11.

§ 1325. Substitution of bail

Bail may be substituted by the defendant or bondsman, at any time before a breach of the undertaking, by substituting any other proper and sufficient bond of like value as provided herein, and the official taking the new bail shall make an order where money had been deposited that the money be refunded to the person depositing the same, where property had been pledged, that a certificate of discharge be issued and the lien previously filed be released and the original

undertakings of whatever nature shall be canceled and the new undertaking shall be substituted therefor. Laws 1965, c. 184, § 25.

Library references

Bail, Key No. 55 et seq.
C.J.S. Bail § 55 et seq.

§ 1326. Defects, omissions, irregularities, etc.

(a) No undertaking shall be invalid, nor shall any person be discharged from his undertaking, nor a forfeiture thereof be stayed nor shall judgment thereon be stayed, set aside or reversed, the collection of any such judgment be barred or defeated by reason of any defect of form, omission or recital or of condition, failure to note or record the default of any principal or surety, or because of any other irregularity, or because the undertaking was entered into on Sunday or other holiday, if it appears from the tenor of the undertaking before what magistrate or at what court the principal was bound to appear, and that the official before whom it was entered into was legally authorized to take it and the amount of bail is stated.

(b) If no day is fixed for the appearance of the defendant, or an impossible day or a day in vacation, the undertaking, if for his appearance before a magistrate for a hearing, shall bind the defendant to appear in ten days from the receipt of notice thereof to the defendant, his counsel, or any surety or bondsman on the undertaking; and if for his appearance in a court for trial, shall bind the defendant so to appear on the first day of the next term of court which shall commence more than three days after the giving of the undertaking.

(c) The liability of a person on an undertaking shall not be affected by reason of the lack of any qualifications, sufficiency or competency provided in the criminal procedure law, or by reason of any other agreement that is expressed in the undertaking, or because the defendant has not joined in the undertaking. Laws 1965, c. 184, § 26.

Library references

Bail, Key No. 55 et seq.
C.J.S. Bail § 55 et seq.

§ 1327. Surrender of defendant prior to breach

At any time before there has been a breach of the undertaking in any type of bail provided herein, the surety or bondsman may surrender the defendant, or the defendant may surrender himself, to the official to whose custody the defendant was committed at the time bail was taken, or to the official into whose custody the defendant would have been given bail he been committed. The defendant may be surrendered without the return of premium for the bond if he has been guilty of nonpayment of premium, changing address without notifying his bondsman, conceals himself, or leaves the jurisdiction of the court without the permission of his bondsman, or of violating his contract with the bondsman in any way that does harm to the bondsman; or the surety, in violates his obligation to the court. Laws 1965, c. 184, § 27.

Library references

Bail, Key No. 80.
C.J.S. Bail § 97.

§ 1328. Procedure for surrender of defendant

The person desiring to make a surrender of the defendant shall procure a certified copy of the undertakings and deliver them together with the defendant to the official in whose custody the defendant was at the time bail was taken, or to the official into whose custody he would have been given bail he been committed, who shall detain the defendant in his custody thereon, as upon a commitment, and by a certificate in writing acknowledge the surrender.

Upon the presentation of certified copy of the undertaking and the certificate of the official, the court before which the defendant has been held to answer or the court in which the preliminary examination, indictment, information or appeal, as the case may be is pending shall, upon notice of three days given by the person making the surrender to the prosecuting officer of the court having jurisdiction of the offense, together with a copy of the undertakings and certificate, order that the obligors be exonerated from liability on their undertakings; and, if money has been deposited as bail, that such money or bonds be refunded. If property pledged, a certificate of exoneration be issued and the lien previously filed be released and the undertakings of whatever nature be canceled. Laws 1965, c. 184, § 28.

Library references
Bail, Key No. 80.
C.J.S. Bail § 87.

§ 1329. Arrest

For the purpose of surrendering the defendant, the surety may arrest him before the forfeiture of the undertaking, or by written authority endorsed on a certified copy of the undertaking, may empower any peace officer to make arrest, first paying the lawful fees therefor. Laws 1965, c. 184, § 29.

Library references
Bail, Key No. 80.
C.J.S. Bail § 87.

§ 1330. Forfeiture of bond

If there is a breach of the undertaking, the court before which the cause is pending shall declare the undertaking and any money that has been deposited as bail, forfeited and the proceeds thereof paid into the clerk of the court. In the case of a surety bondsman or professional bondsman, the court shall immediately direct a copy of said order and judgment of forfeiture to the commissioner who shall give notice by mailing a copy of said order and judgment of forfeiture to the surety bondsman and his insurer or the professional bondsman and directing them to make a deposit to the commissioner of cash or other valuable security in the face amount of said forfeiture.

Should the said deposits not be made to the commissioner within thirty days from the date of order of forfeiture, the commissioner shall:

(a) In the case of a "surety bondsman" immediately cancel the license privilege and authorization of the insurer to do business within the State of Oklahoma and cancel the license of all of said insurers, surety bondsman agents or runners who are licensed by this act.

(b) In case of "professional bondsman" withdraw the face amount of the said forfeiture from the original deposit provided herein, depositing said amount in a separate escrow account pending appeal and final judgment upon said forfeiture. The commissioner shall then immediately direct the said "professional bondsman" to make additional deposits to bring the original deposit to the required level. Should the "professional bondsman" after being notified as herein set forth fail to make such additional deposit within ten days from receipt of notice, his license shall be revoked and all sums presently on deposit shall be held by the commissioner to secure the face amounts of bonds outstanding. Upon release of said bonds the amount of deposit in excess of said bonds shall be returned to the bondsman. Provided, however, the bail bondsman or the insurer shall have had written notice at the place of his business of the trial or hearing of defendant at least ten days before his required appearance of defendant, unless the appearance is scheduled within that time from the execution of bond. Laws 1965, c. 184, § 30.

Library references
Bail, Key No. 75 et seq.
C.J.S. Bail §§ 81, 82.

§ 1331. Property bond, forfeiture

If the undertaking is a property bond, the clerk shall record the order and judgment of forfeiture in the proper records of said county. Laws 1965, c. 184, § 31.

Library references
Bail, Key No. 77(2).
C.J.S. Bail §§ 85, 89.

§ 1332. Notice of forfeiture—Motion to set aside

In the event of the forfeiture of a bail bond the clerk of the trial court shall notify the bondsman on said bond who may, within thirty days from the date or such notice, file with the court a motion to set aside the order of forfeiture which motion shall contain the grounds upon which it relies. If the bondsman fails to file said motion within the thirty days, the forfeiture shall become a final judgment and the clerk shall immediately issue execution upon the undertaking in accordance with law.

(1) Where the motion to set aside is filed within thirty days as provided above, the court shall set the motion on a date certain for hearing and within thirty days of filing of said motion and if such motion be denied, the court shall enter judgment of forfeiture against the bondsman for the amount of the undertaking and the clerk shall at once record the judgment. The bondsman may appeal from said judgment to the supreme court as in all other civil cases and execution shall be stayed pending said appeal and final judgment. Upon final judgment of forfeiture being entered, the clerk shall immediately issue execution to the sheriff who shall forthwith levy such execution according to law and when collected it shall be paid to the clerk of the court.

(2) Where final judgment of forfeiture of the undertaking of a surety bondsman or professional bondsman who has on deposit with the commissioner a deposit of escrow pending appeal and final judgment as provided herein and where final judgment of forfeiture is entered, the clerk of the county wherein the forfeiture lies shall issue execution to the sheriff who shall forthwith levy such execution according to law and the said deposit of escrow shall be paid into the clerk of the court. In the event that an appeal is perfected as provided herein and final judgment is entered, setting the said forfeiture aside, the bondsman shall be exonerated and his property restored.

(3) If the defendant's failure to appear was the result of being in the custody of any Federal Court of the United States, or in custody of any court within the State of Oklahoma or in custody of any court within any other state, providing the defendant had prior to leaving the State of Oklahoma, obtained written permission to go to the state wherein he is in custody, by the judge of the assigned court wherein his case is pending, forfeiture will lie in those instances where custody is the result of a surrender of the prisoner by the bondsman affected or such custody is found to be the result of action to avoid appearance in another court, otherwise forfeiture shall not lie, but the county attorney shall direct a hold order to the official, magistrate, court of law enforcement agent wherein the defendant is in custody. Providing, that all expenses accrued as a result of returning the custody of the defendant shall be borne by the bondsman. If the defendant is surrendered to custody of the sheriff or court wherein the forfeiture has been ordered within thirty days from the date of said order, the court, upon the motion of the defendant or the bondsman shall set aside the forfeiture for good cause shown and upon proof that there has been no previous forfeiture of bond in the case at issue. From and after the effective date of this act the county attorney shall not receive any fees, bonuses or other monies or property for or by reason of his services or actions in connection with or collection of bond forfeitures under the provisions of this act. Laws 1965, c. 184, § 32.

Library references
Bail, Key No. 77(1).
C.J.S. Bail § 85 et seq.

§ 1333. Enforcement of liability

All liability of the bondsman may be enforced on motion without necessity of an independent action if conformance with the foregoing is shown. Laws 1965, c. 184, § 33.

Library references
Bail, Key No. 77(1).
C.J.S. Bail § 85 et seq.

§ 1334. Bail on personal recognizance

(A) Any person in custody before a court or magistrate of the State of Oklahoma subject to discretion of the court, may be admitted to bail on his personal recognizance subject to such conditions as the court or magistrate may reasonably prescribe to assure his appearance when required. Any person admitted to bail as herein provided shall be fully appraised by the court or magistrate of the penalties provided for failure to comply with the terms of his recognizance and, upon a failure of compliance, a warrant for the arrest of such person shall be issued forthwith. Laws 1965, c. 184, § 34.

Library references
Bail, Key No. 42 et seq.
C.J.S. Bail § 33 et seq.

1. In general
Refusal of district court to permit defendant charged with first-degree manslaughter to remain on bond on his own recognizance when he did not enter a plea or ask for additional time to plead but elected to stand mute and let the court enter a plea of not guilty for him was not abuse of discretion. In re Pendygraft, Okl.Cr., 438 P.2d 290 (1968).

§ 1335. Penalty for incurring forfeiture or failing to comply with personal recognizance

Whoever, having been admitted to bail for appearance before any magistrate or court of the State of Oklahoma, (1) incurs a forfeiture of the bail as provided in Section 34 of this act[1] and wilfully fails to surrender himself within thiry days following the date of such forfeiture, or (2) wilfully fails to comply with the terms of his personal recognizance, shall be fined not more than Five Thousand Dollars ($5,000.00) or imprisoned not more than two (2) years, or both. Laws 1965, c. 184, § 35.

1 Section 1334 of this title.

Library references
Bail, Key No. 75.
C.J.S. Bail §§ 81, 82.

§ 1336. Penalty

Any person violating any of the provisions of this act relating to bondsman shall, upon conviction, be fined not more than Five Hundred Dollars ($500.00) for each offense, or imprisoned in the county jail for not more than six (6) months, or both. Laws 1965, c. 184, § 36.

§ 1337. Effective date—Disposition of fees and moneys

The provisions of this act shall become effective January 1, 1966. All fees, receipts and moneys collected by the commissioner under and pursuant to this act shall be paid into the general fund of the State Treasury and the amount so deposited is hereby dedicated to the commissioner for the payment of the expense of examinations, licensing, investigations, the providing of forms, and other related expenses necessitated by this act. All payments out of this appropriation shall be made by the State Treasurer on warrants of the State Auditor issued on vouchers approved by the Insurance Commissioner. These funds are in addition to other appropriations made to the office of Insurance Commissioner and if not expended by the last day of any fiscal year shall revert to the General Fund of the state. Laws 1965, c. 184, § 37.

§ 1338. Use of telephone

Each person arrested shall have an opportunity to use the telephone to call his attorney and bondsman before being placed in jail, or within six hours thereafter. Laws 1965, c. 184, § 38.

Library references
Arrest, Key No. 70.
C.J.S. Arrest § 17.

§ 1339. Access to jails

Every person who holds a valid bail bondsman's license issued by the insurance commissioner and registered as required in Section 20 of this act[1] shall be entitled to equal access to the jails of this state for the purpose of making bond, subject to the provisions of this act and the rules and regulations adopted and promulgated in the manner provided by law. Laws 1965, c. 184, § 39.

1 Section 1320 of this title.

Library references
Bail, Key No. 60.
Prisons, Key No. 12.
C.J.S. Bail § 60.
C.J.S. Prisons § 17.

§ 1340. Persons excluded

This act shall not apply to a person who writes only one bond within each calendar year and who does not charge a fee for his services. Laws 1965, c. 184, § 40.

Article 2, Section 19 of the Oklahoma Constitution:

> "The right of trial by jury shall be and remain inviolate except in civil cases wherein the amount in controversy does not exceed $100.00;"

Title 12 O.S.A. 556 which provides:

> "Issues of law must be tried by the Court unless referred. Issues of fact arising in actions for the recovery or personal property shall be tried by a jury unless a jury trial is waived * * * .";

Article 2, Section 7 of the Oklahoma Constitution which provides:

> "No person shall be deprived of life, liberty or property without due process of law.";

Article 4, Section 1 of the Oklahoma Constitution which provides:

> "The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.";

Seventh Amendment to the Constitution of the United States which provides:

"In suits at common law where the value of the controversy shall exceed $20.00, the right of trial by jury shall be preserved * * * .";

Fourteenth Amendment to the United States Constitution which provides:

"Nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of law.";

Article 1, Section 1 of the United States Constitution:

"All legislative powers herein granted shall be vested in the Congress of the United States which shall consist of a Senate and House of Representatives.";

Article 2, Section 1 of the United States Constitution:

"The executive power shall be vested in a President of the United States of America * * * .";

Article 3, Section 1 of the United States Constitution:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.";

28 U.S.C., Section 1257 (2) which provides:

"By appeal, where is drawn in question the validity of a statute of any State on ground of its being repugnant to the Court, treaties or laws of the United States and the decision is in favor of its validity."

APPENDIX B

OPINION OF THE SUPREME COURT OF OKLAHOMA APPEALED FROM; 455 P.2d 690;

List of the 21 judgments rendered by the Seventh Judicial District Court of Oklahoma County, Oklahoma pursuant to the 1965 Bail Bond Act on which the appellants herein sought a writ of prohibition from the Supreme Court of Oklahoma to enjoin the enforcement and execution of the judgments pursuant to the provisions of the 1965 Bail Bond Act, the total amount of said judgment being $40,250.00;

A copy of Bail Bond for Appearance of Defendant in the District Court;

Copy of the Order and Judgment of Forfeiture entered by the District Court of the Seventh Judicial District of Oklahoma County, Oklahoma;

Copy of Notice of Bail Bond Forfeiture sent by Dale Smith, Court Clerk of the District Court of Oklahoma County, Oklahoma to the bondsman and surety;

Copy of Notice of Bail Bond Forfeiture sent by Joe B. Hunt, Insurance Commissioner of the State of Oklahoma, to the bondsman and his surety.

MARYLAND NATIONAL INSURANCE COMPANY, A CORPORATION, AND JAMES E. MASON, PETITIONERS,

v.

THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA, AND A. P. VAN METER, DISTRICT JUDGE, RESPONDENTS.

MARYLAND NATIONAL INSURANCE COMPANY, A CORPORATION, AND CARL BROOKS, PETITIONERS,

v.

THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA, AND JACK R. PARR, ET AL., RESPONDENTS.

Nos. 43342, 43437.

Supreme Court of Oklahoma.
April 15, 1969.
Rehearings Denied July 1, 1969.

Original proceedings in which surety upon forfeited bail bond sought issuance of writs of prohibition against district court and some of judges thereof. The Supreme Court, Jackson, J., held that statute which authorized special procedure for enforcing liability of surety on bail bond, but which did not include jury trial did not unconstitutionally deny surety right to jury trial.

Petitions for writ denied and temporary order staying execution quashed.

1. Jury Key No. 10

Right to trial by jury, declared inviolate by Constitution, has reference to right as it existed in territory at time of adoption of Constitution, and right to jury trial was not predicated upon statutes existing in territories at time, but right as guaranteed under United States Constitution and according to course of common law.

U.S. C.A.Const. Amend. 7; O.S.1961 Const. art. 2, § 19.

2. Jury Key No. 21(6)

At common law, surety on forfeited bail bond in criminal case was not entitled to jury trial at any stage of proceedings except in cases in which, for any reason, it was necessary to bring ordinary common-law action of debt upon forfeited recognizance.

3. Jury Key No. 21(2)

Statute which authorized special procedure for enforcing liability of surety on bail bond but which did not include jury trial did not unconstitutionally deny surety upon forfeited bail bond right to jury trial. 12 O.S.1961, § 556; 22 O.S.1961, § 1108; 59 O.S.Supp. §§ 1301-1340, 1330, 1332, 1333; U.S.C.A.Const. Amend. 7; O.S.1961 Const. art. 2, § 19; Fed.Rules Crim.Proc. rule 46(f), 18 U.S.C.A.

4. Bail Key No. 77(1)

Constitutional Law Key No. 249, 306

Statute authorizing special procedure for enforcing liability of surety on bail bond but requiring actual notice of beginning of 30-day period for filing motion to set aside forfeiture and requiring determination adverse to surety before judgment against surety becomes final does not deny due process or equal protection. 59 O.S. Supp. §§ 1301-1340, 1330, 1332, 1333.

Syllabus by the Court

1. The right to trial by jury, declared inviolate by Article II, Section 19, of the Constitution of Oklahoma, except as modified by the Constitution itself, has reference to the right as it existed in the territories at the time of the adoption of the Constitution, and the right to a jury trial therein referred to was not predicated upon the statutes existing in the territories at that time, but the right as guaranteed under the United States Constitution and according to the course of the common law.

2. At the common law, the surety on a forfeited bail bond in a criminal case was not entitled to a jury trial at any stage of the proceedings except in cases where, for any reason, it was necessary to bring an ordinary common law action of debt upon the forfeited recognizance.

Original proceedings in this court in which petitioners, surety bondsmen and insuror upon forfeited bail bonds in criminal cases, ask this court to assume original jurisdiction and issue writs of prohibition against the respondents, District Court of Oklahoma County and some of the judges thereof. Applications to assume original jurisdiction granted; petitions for writs of prohibition denied.

Forest N. Simon, Martin & Kisner, Oklahoma City, for petitioners.

Curtis P. Harris, Dist. Atty., D. K. Cunningham, Asst. Dist. Atty., Oklahoma City, for respondents.

JACKSON, Justice.

These two related original proceedings raise questions of first impression concerning the constitutionality of the bail bond forfeiture provisions of an act of the 1965 Legislature, now codified as 59 O.S.1968 Supp., Sections 1301 through 1340, as they affect the liability of the surety upon the bond. Because of the public nature of the questions presented, we have decided to grant petitioners' Applications to Assume Original Jurisdiction in order to consider their Petitions for Writ of Prohibition.

Prior to the adoption of the 1965 act, the rights of sureties on bail bonds as regards forfeiture were determined under 22 O.S. 1961, Section 1108, which provided, among other things, that "After the forfeiture, the county attorney must proceed with all due diligence, by action against the bail upon the instrument so forfeited". Under well settled law, this section required the county attorney

to file an ordinary civil action on the forfeited bond. Since no special procedure was provided, the general rules of civil procedure were applicable, including the requirement of 12 O.S.1961, Sec. 556, that " * * * Issues of fact arising in actions for the recovery of money * * * shall be tried by a jury, unless a jury trial is waived * * *".

The act of the 1965 Legislature, 59 O.S. 1965 Supp., Sec. 1301 et seq., provides special procedure for enforcing the liability of the surety on the bond which does not include a jury trial. This is the basis of petitioners' chief complaint in the proceedings now before us.

Briefly summarized, the pertinent portions of the new statute provide (Sec. 1330) that in the event of a breach of the undertaking, the court shall declare the undertaking forfeited and direct a copy of the order to the Insurance Commissioner, who shall "give notice" by mailing a copy thereof to the surety bondsman and his insurer, directing them to make a deposit in the face amount of the bond within 30 days; (Sec. 1332) that the bondsman shall be notified also by the trial court that he may, within 30 days, file a motion to vacate the forfeiture, stating the grounds therefor, and that if such motion is not filed, the forfeiture "shall become a final judgment and the clerk shall immediately issue execution upon the undertaking in accordance with law". The last sentence of Sec. 1330 also provides in effect that the "bail bondsman or the insurer" shall have at least ten days' notice of the required appearance of the defendant in the criminal case. Sec. 1333 provides that "All liability of the bondsman may be enforced on motion without necessity of an independent action *if conformance with the foregoing is shown*" (emphasis supplied).

It is unnecessary to notice the undisputed facts in these cases except to say that under petitioners' own allegations, full and complete "conformance with the foregoing" was shown, including the giving of both 30 day notices and the 10 day notice referred to in the paragraph above. No motions to vacate the forfeitures were filed. Executions have been issued pursuant to Sec. 1332 and we are asked to prohibit the trial judges from proceeding further in the cases insofar as the collection of money from petitioners is concerned.

In the briefs, petitioners argue that the new statute unconstitutionally denied them the right to a jury trial, and violates due process and equal protection clauses of both state and federal constitutions.

[1] We first consider the question of petitioners' right to a jury trial. In 1921, in Keeter v. State ex rel. Saye, 82 Okl. 89, 198 P. 866, 17 A.L.R. 557, this court gave exhaustive consideration to the question of the jury trial guarantees of our own Constitution, in the face of prior holdings not in harmony, and held:

> "The right to trial by jury, declared inviolate by section 19, art. 2, of the Constitution of Oklahoma, except as modified by the Constitution itself, has reference to the right as it existed in the territories at the time of the adoption of the Constitution, and the right to a jury trial therein referred to was not predicated upon the statutes existing in the territories at that time, but the right as guaranteed under the federal Constitution and according to the course of the common law."

Thus, although it is well settled that the jury trial guarantees of the Seventh Amendment of the United States Constitution have not been considered directly applicable to trials in state courts, 31 Am.Jur. Jury, Section 9, the same result is reached by virtue of Art. 2, Section 19, of our own Constitution, and the above quoted rule. It is equally well settled that the right of trial by jury "preserved" by the United States Constitution is the right as it existed at common law, 31 Am.Jur. Jury, Sec. 12. Therefore, the question for decision is whether the petitioners in these proceedings, obligors on bail bonds in criminal cases, would have been entitled to jury trials as a matter of right at the common law.

[2] We note at the outset that under Rule 46(f) of the Federal Rules of Criminal Procedure, the liability of the obligors on a bail bond in a criminal case in the federal courts may be enforced on motion without a jury trial. Since

this rule was promulgated by the United States Supreme Court itself under authority granted by the Act of Congress of June 29, 1940, c. 445, 54 Stat. 688, it could reasonably be said to constitute at least inferential authority for the proposition that the obligors had no constitutional right under the United States Constitution to a jury trial. Perhaps for this reason, we have been unable to find any case in which the United States Supreme Court has passed directly upon the question before us.

States Supreme Court has passed directly upon the question before us.

No prior decisions of this court precisely in point have been cited, and our own research has disclosed none. This is not surprising, in view of the fact that until 1965, the jury trial requirements of our code of civil procedure were applicable in proceedings to enforce the liability of a bail bondsman, and it was not necessary to examine constitutional guarantees on this question.

The holdings of the courts of other, and older, jurisdictions are therefore helpful on this point. In 1874, in People of the State of New York v. Quigg, 59 N.Y. 83, the Court of Appeals of New York considered a statute enacted in 1844 which provided for summary judgments, without the intervention of a jury, upon forfeited recognizances. The appeal in that case was from an order of the trial court denying the motion of Quigg, a bail bond bondsman, to vacate the summary judgment entered against him on the forfeited bond. It was argued, among other things, that the statute, denied him the right to trial by jury as guaranteed in state and federal constitutions. The court said:

> " * * * The right to a trial by jury, if any such right would have existed but for the special laws affecting the obligations and liability of the defendants, was waived by the terms of the recognizances and assent of the cognizors * * * . But the proceedings for judgment were not suits at common law, but a special statutory proceeding, summary in its character and unknown to the common law, and therefore not within the provision of the federal Constitution invoked by defendants. * * *
>
> "In actions upon recognizances, the trial was at common law by the record, and by the court and not a jury, and even in actions upon recognizances an issue upon the existence of the recognizance as well as the forfeiture were not triable by a jury."

In that case, the New York Court of Appeals referred with approval to an earlier (1850) case in the Supreme Court of New York, Gildersleeve and Robert v. People, 10 Barb. 35, which had considered the same 1844 act. In the case, the court said:

> "A recognizance is an acknowledgment of a debt, and when filed in a court of record is a matter of record. At common law it bound the lands of conusor and an execution might be issued upon it as upon a judgment. * * * It was not necessary to bring an action upon the recognizance, because there was nothing to be tried. The recognizance was an acknowledgment of record that a debt was due, and was in its legal effect a confession of judgment. * * *
>
> "It will be seen that this is substantially the re-establishment of the rule which existed at common law."

In Walker v. Commonweath, 144 Va. 648,131 S.E. 230, an appeal by the sureties in a bail bond forfeiture case, the court said:

> "The recognizance, when duly evidenced, is a debt of record upon which an award of execution may be had in a proceeding by a writ of scire facias. The general issue in such a proceeding is nul tiel record, in which the plaintiff has the burden of proof. The sole question involved in such issue is the existence of the record alleged in the scire facias. The record itself is the only evidence receivable to prove its contents, and the issue is to be tried by the Court upon an inspection of the record."

On this problem, the history of the early 19th century laws of the State of New York, as outlined in Gildersleeve, supra, bear a rather peculiar analogy to the questions now before us relating to the act of our 1965 Legislature.

In New York before 1818, a recognizance, when forfeited, was sent by the court in which the forfeiture was taken to the court of exchequer, which was authorized to enforce it by execution. In 1818, the courts of common pleas of the various counties were vested with like powers relative to the collection of forfeited recognizances. This statutory change in the jurisdiction of the courts gave rise to an unforeseen problem. As the court said in *Gildersleeve*:

> "About the year 1830 an action of debt was for the first time brought in the supreme court of this state founded on a recognizance. The reason why this course was pursued was, that when the powers of the court of exchequer, which was a branch of the supreme court, were transferred to the several courts of common pleas, *an execution issued by one of those courts could not be sent out of the county.* * * * " (Emphasis supplied)

It was necessary to file an ordinary common law action of debt, in which issues of fact were tried to a jury, in order to reach the assets of a bail bondsman outside the county in which the bond was forfeited. The subsequent act of 1844, under consideration in the Gildersleeve case, which was "substantially the re-establishment of the rule which existed at the common law" again made the common law action of debt unnecessary.

By analogy to our own situation: before 1965, it was necessary by virtue of statute in this state to bring the civil procedure equivalent of the common law action of debt in order to collect a forfeited recognizance. The 1965 act, making more summary relief available for such purpose, renders the independent civil action unnecessary.

It is obvious that in the common law procedure we have been discussing, no provision was made for plea or proof by the debtor of matters arising after the date of the recognizance entitling him to a discharge of his liability. In the modern cases these are actually in the nature of affirmative defenses and are familiarly described as defenses resulting from an "act of God, act of the law, or act of the obligee". See Pruitt v. State ex rel. Farris, 186 Okl. 205, 97 P.2d 35. We must therefore determine whether similar relief was available at the common law, and, if so, whether a jury was required.

In considering this same question, the New York court said in *Gildersleeve*:

> "It was said upon the argument that this statute deprives a party of the opportunity of setting up any matter which might be alleged in discharge of his liability. But we do not think that such will be its practical effect. Under the common law rule it frequently occurred that there were matters which had arisen subsequent to the entering into of the recognizance, which in equity and justice entitled the conusor to a discharge, and a writ of *audita querela* was resorted to for that purpose. But afterwards, as a more convenient method, the courts were in the habit of granting summary relief upon notice. * * * "

Proceedings upon the writ of audita querela had all the incidents of an ordinary action, including, presumably, the right of trial by jury on issues of fact. 7 Am.Jur. 2d Audita Querela, Sec 4.

It appears, however, that the reference to audita querela in *Gildersleeve* was not entirely appropriate, at least as applied to forfeited bail bonds in criminal cases. Although there were some differences, bail bonds were traditionally classed as recognizances. Sec 8 Am.Jur. 2d Bail and recognizances, Sec 2. Common law recognizances seem to have originated as a result of the desires of creditors to avoid the hazards and delays incident to obtaining judgments in order to collect debts. They did so by obtaining what may quite

literally be called "conditional agreed judgments" against their debtors at the time the debt was incurred. The confession of judgment of necessity involved an actual waiver of the right to jury trial. Such judgments were discharged upon performance of the condition or could be enforced by execution upon breach thereof. According to one authority, at least in the early development of the common law, execution could issue even without the writ of scire facias, which was only required when execution was desired more than one year after the date of the recognizance.

These procedures were followed in ordinary transactions involving the loan of money, and in bail transactions in both civil and criminal cases. They proved so convenient that in 1285 the Statute of Merchants made similar procedures available to merchants in the principal cities, and in 1353 the Statute of Staples made them available to merchants in the "staple" towns.

In loan transactions, mercantile transactions, and in bail transactions in civil cases, the recognizance amounted to a "conditional agreed judgment" as between private parties.

Abuses of the procedure soon developed, probably because of fraud and collusion between the officials who enrolled the recognizances and judgment creditors, and in 1336, even before the Statute of Staples, Parliament authorized the writ of audita querela as a remedy. Although it was originally aimed at the abuses incident to the common law recognizances, it soon became available against any judgment whose enforcement would be contrary to justice, either because of matters arising subsequent to its rendition or because of prior existing defenses which were not available in the original action due to the fraudulent conduct of the judgment creditor. In the latter capacity it came to this country with the colonists.

Audita querela, however, was not available as against the crown. Avery v. United States, 12 Wall. (U.S.) 304, 20 L.Ed. 405. In that case, for that reason among others, the United States Supreme Court affirmed the judgment of a Circuit Court denying Avery the right to attack, by writ of audita querela, a prior money judgment "for a large demand" obtained against him by the United States at a time when he had, but allegedly did not know of, a proper set-off against it.

Since in an attack by a surety upon a judgment based upon a bail bond forfeiture in a criminal case, the judgment creditor is the sovereign and not a private party, audita querela, with its attendant right to a jury trial, was not available at the common law.

For comments concerning the jury, recognizances or debts of record, the Statute of Merchants, the Statute of Staples and the writ of audita querela, upon which much of the foregoing discussion is based, see Plucknett, A Concise History of the Common Law, pages 107 to 138 and 380 to 394; 7 Am.Jur.2d Audita Querela; and 8 Am.Jur.2d Bail and Recognizance. We are aware of statements in some of the cases that audita querela was in the nature of an equitable remedy; see, for instance, Oliver v. City of Shattuck ex rel. Versluis, 10 Cir., 157 F.2d 150. This seems doubtful in view of its origin, according to Plucknett, in Parliament in 1336.

The same relief available as between private parties by the use of audita querela was available, but without a jury, to the surety on a criminal bail bond through the unquestioned power of the common law courts to open, modify or vacate judgments. These proceedings after judgment were addressed to the sound judicial discretion of the court, 30A Am.Jur., Judgments, Sec. 632, and were particularly appropriate in the case of judgments by confession, 30A Am. Jur., Judgments, Sec. 637. As we have seen, the common law recognizance was literally a "conditional judgment by confession". It is said that as to judgments by confession, the power of the common law courts to open, modify or vacate a

judgment did not end with the term but might be exercised thereafter, 30A Am.Jur., Judgments, Sec. 650; 112 A.L.R. 798. The grounds for relief on motion in proceedings after judgment were generally the same as those which would have justified the writ of audita querela. 30A Am.Jur., Judgments, Sec. 656.

On the jury trial question, we conclude that at the common law the surety on a forfeited bail bond in a criminal case was not entitled as a matter of right to a jury trial at any stage of the proceedings except in cases where, for any reason, it was necessary to bring an ordinary common law action of debt upon the forfeited recognizance. As we have seen, under the 1965 act it is not necessary to follow that procedure in this jurisdiction.

[3] We hold that petitioners in the cases now before us were not unconstitutionally denied the right to jury trial by the statute under consideration.

[4] In the briefs in this court, petitioners do not argue extensively the due process and equal protection questions raised in their applications and petitions. It is suggested that the new procedure provided in the 1965 act denies them notice, and denies them an opportunity to defend in an orderly proceeding before a competent and impartial tribunal having jurisdiction of the issues and jurisdiction of the parties.

We are unable to agree. It is too well settled to require citation of authority that the existing applicable law is a part of every contract. Petitioners were therefore charged with notice of the fact that in case of the forfeiture of the bonds, they could, within 30 days, file motions to set the forfeitures aside, and that at the hearing on the motions they could raise any defenses available to them under the circumstances. Note also that the new statute (Sec. 1532) provides for *actual* notice of the beginning of the 30 day period, which was concededly given in these cases, and that the motions must be heard and determined adversely to petitioners before the judgment against thm becomes final. Petitioners do not argue that the hearing on the motions would not be an "orderly proceeding".

The petitions for writ of prohibition are denied, and the temporary order staying execution, heretofore entered in these cases, is quashed.

All the Justices concur.

JUDGMENTS ENTERED PURSUANT TO 1965 ACT

Case No. 34516, State vs Ervin Merle Gilbert, $3,000 bond, Judge A. P. VanMeter

Case No. DC30289, State vs Charles E. Dawson, $1,000 bond, Judge Jack R. Parr

Case No. DC34376, State vs William Bethel Innis, $2,500.00 bond, Judge Carmon C. Harris

Case No. DC 34378, State vs William F. Rifer, $1,000 bond, Judge, Clarence M. Mills

Case No. DC33745, State vs Robert Leonard Liles, $2,000 bond, Judge, Jack R. Parr

Case No. DC34078, State vs Goldie Mae Hudson, $2,000 bond, Judge, William S. Myers, Jr.

Case No. CP37940, State vs Robert Marion Lafery, $500 bond, Judge, Ben Lafon

Case No. CP37753, State vs Bettye Jean Kemp, $250 bond, Judge, Ben Lafon

Case No. CP37117, State vs Jean Othal Thorton, $500 bond, Judge, Dwain D. Box

Case No. CP38354, State vs John Leonard Kester, Jr., $2000 bond, Judge, Dwain D. Box

Case No. CRF69-181, State vs Robert Marion Lafery, $1,000 bond, Judge, Jack L. Freeman

Case No. CRF69-132, State vs Raymond Advie Lee, $1,000 bond, Judge, Marvin Cavnar

Case No. CRF69-434, State vs Charlie Russell Freitag, $1,500 bond, Judge, Mildred Boyer

Case No. CRF69-352, State vs Gary Eugene Franklin, $1,000 bond, Judge, Wendell Foster

Case No. CRF69-93, State vs Perry Franklin Guffey, $1,000 bond, Judge, Richard Wells

Case No. CRF69-353, State vs Gary Eugene Franklin, $1,000 bond, Judge, William Kessler

Case No. CRF69-94, State vs Perry Franklin Guffey, $1,000 bond, Judge Richard Wells

Case No. CP35245, State vs Ronald Wiloyd Gilbert, $3,000 bond, Judge, Ben Lafon

Case No. CRF69-92, State vs Virgil Gilbert Lawson, $10,000 bond, Judge, Wendell Foster

Case No. CRF69-131, State vs Gerald Wayne Finchum, $3,000 bond, Judge Jack L. Freeman

Case No. CRF69-130, State vs Gerald Wayne Finchum, $2,000 bond, Judge, Jack L. Freeman

TOTAL AMOUNT: $40,250.00

Exhibit "A"

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	No. 34516
ERVIN MERLE GILBERT Defendant.	)	

ORDER AND JUDGMENT OF FORFEITURE

On this 24th day of September, 1968, the above cause came on for trial according to regular assignment of the docket of this Court, and said case being called for trial, the plaintiff announced ready for trial, and the defendant Ervin Merle Gilbert, came not, but failed to appear; thereupon the Court caused the said Ervin Merle Gilbert, defendant herein, to be called three times in open court to appear and answer the charges filed against him herein and save the forfeiture of said defendant's bond; but said defendant failed to appear and wholly made default in appearance.

And the Court called defendant's bondsman three times in open court to come into court and bring the body of said defendant, Ervin Merle Gilbert, and save the forfeiture of said defendant's bond, all of which said bondsman failed to do. Thereupon, the District Attorney, Curtis P. Harris, acting by James L. Swartz, Assistant District Attorney, moved the Court to declare a forfeiture of the defendant's Appearance Bond in this Cause.

And the Court, having examined the files and papers in this cause, and having made inquiry as to whether there is any lawful or justifiable excuse why the defendant failed to appear at this trial, and being fully advised in the premises, finds:

That heretofore in this cause and on the 11th day of June, 1968, an Information was filed by the District Attorney of the said County, charging said defendant, Ervin Merle Gilbert, with the offense of Uttering a Forged Instrument, that on the 21st day of June, 1968, the said defendant, Ervin Merle Gilbert, filed herein in this cause, an Appearance Bond signed by

himself as principal, and signed by James E. Mason, a licensed surety bondsman, and his insurer Maryland National Insurance Company as surety, said bond bearing the date of the 10th day of May, 1968, and providing among its items that they, the said principal, and surety bondsman, and his insurer, acknowledges themselves to be indebted to the State of Oklahoma in the sum of Three Thousand Dollars ($3,000.00), to be made and levied on their respective goods, lands, tenements, cash deposits and/or escrow deposits; to be void, however, if said defendant, Ervin Merle Gilbert, shall personally be and appear before the said court on the 9th day of September, 1968, at 9:00 o'clock, A.M., of said day and from term to term, and from day to day of each term to answer said charges preferred against him and to do and receive what shall be enjoined by said Court upon him, and shall not depart the said Court without leave;

That this case was duly and regularly set for trial on the 9th day of September, 1968, at which time said defendant was required to appear under the terms and obligations of said Appearance Bond; and thereafter said case was continued to the 24th day of September, 1968;

That on the 16th day of August, 1968, the said bail bondsman herein, James E. Mason, was notified in writing at his place of business at 227 Couch Drive, Oklahoma City, Oklahoma, of the trial of the above cause, and that such notice was served upon the said bondsman at least ten days before the required appearance of the defendant for trial herein;

That said defendant failed to appear, and no excuse having been offered for failure to so appear, the Court finds that the defendant's failure to appear is without excuse, and that the conditions of said Appearance Bond have been broken by both said defendant and his said bondsman, James E. Mason, and that said bond should be declared forfeited.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Appearance Bond of the said defendant, Ervin Merle Gilbert, be and the same is hereby declared forfeited, and the Clerk of the Court is hereby directed to enter this order upon the minutes of this Court, and to issue an Alias Warrant for the arrest of said defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court Clerk shall immediately direct a copy of this Order and Judgment of Forfeiture to the Insurance Commissioner of the State of Oklahoma; and it is further ordered that the said Insurance Commissioner shall give notice of the forfeiture herein by mailing a copy of the Order and Judgment of Forfeiture herein to the surety bondsman herein, James E. Mason, and his insurer, Maryland National Insurance Company, directing them to make a deposit with the said Insurance Commissioner of the State of Oklahoma, of cash or other valuable security, in the face amount of the said forfeited bond, to-wit: Three Thousand Dollars ($3,000.00), such deposit to be made within 30 days from this date.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court Clerk shall notify the said bondsman James E. Mason, and his insurer, Maryland National Insurance Company, of the forfeiture herein, and that the said bondsman may, within 30 days from the date of this notice, file with the Court a motion to set aside the Order and Judgment of Forfeiture herein, which motion shall contain the grounds relied upon to set aside such forfeiture, and further that if the said bondsman fails to file the said motion to set aside the forfeiture within 30 days, the forfeiture shall become a final judgment, and the Clerk shall immediately issue execution upon the undertaking in accordance with law.

/s/ A. P. Van Meter
JUDGE OF SAID COURT
A. P. VAN METER
Judge of the District Court

O.K.
CURTIS P. HARRIS
DISTRICT ATTORNEY
/s/ Jack A. Swindensky
Assistant District Attorney

I, DALE SMITH, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 8 day of Aug., 1968.

DALE SMITH, Court Clerk
By /s/ Dan Gray, Deputy.

Exhibit "B"

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	No. 34516
ERVIN MERLE GILBERT	)	
Defendant.	)	

NOTICE OF BAIL BOND FORFEITURE

THE STATE OF OKLAHOMA TO James E. Mason, Bondsman, and Maryland National Insurance Company, His Surety,

You, and each of you, are hereby notified that on the 24th day of September, 1968, a forfeiture against the said Defendant, Ervin Merle Gilbert, was had in the above styled cause, in which you, the said James E. Mason, are bondsman, and in which you, the said Maryland National Insurance Company, are his surety on the bail bond of the said defendant, and that you may, within 30 days from the date hereof, file with the Court a motion to set aside the order of forfeiture, which motion shall contain the grounds upon which you may rely to set aside such forfeiture.

You, and each of you, are further notified that if you should fail to file such motion within 30 days from this date, such forfeiture shall become a final judgment, and execution shall immediately be issued as provided for by law.

A certified copy of the Order and Judgment of Forfeiture is enclosed herewith.

Dated this 8th day of October, 1968.

DALE SMITH, COURT CLERK
By /s/ Dan Gray, Deputy

RECEIVED BY
OCT 11 1968
Century Surety Underwriters, Inc.

In the Justice of the Peace Court of Oklahoma County, State of Oklahoma.

BOND FOR APPEARANCE IN DISTRICT COURT

STATE OF OKLAHOMA, OKLAHOMA COUNTY, ss:

BE IT REMEMBERED, That on the 10 day of June, 1968, Ervin Gilbert, as principal of Oklahoma County and State of Oklahoma aforesaid, and the undersigned sureties personally appeared before the undersigned Justice of the Peace in and for Oklahoma City District, and jointly and severally acknowledged themselves to be indebted to the State of Oklahoma in the sum of $3000.00 to be made and levied on their respective goods, chattels, tenements, cash deposits and/or escrow deposits to be void however, if said Ervin Gilbert defendant who has been committed to the County Jail of Oklahoma County, State of Oklahoma, shall personally be and appear before the District Court of said County on the next day of Term, 1968, at 9:00 o'clock A.M. on said day, and from term to term and from day to day of each term to await the action of the District Court of the Thirteenth Judicial District sitting in and for Oklahoma County on the charge preferred against him for the offense of Uttering a Forged Instrument, and for which offense he has been bound over by the undersigned Justice of the Peace to await the action of the said District Court; and that said defendant shall not depart from said Court without leave.

Witness our hands and seal this 10 day of June, 1968.

/s/ Ervin M. Gilbert

Principal

Maryland National Insurance Company Surety

By /s/ James E. Mason
Attorney-In-Fact (SEAL)

Taken, subscribed and acknowledged this ..... day of ....., 19.....

/s/ Richard D. Wells
Justice of the Peace

This undertaking approved this ..... day of ....., 19.....

/s/ Richard D. Wells
Justice of the Peace

FILED IN DISTRICT COURT
Oklahoma County, Okla.
JUN 21 1968
DALE SMITH, Court Clerk
By /s/ W. H. Regean, Deputy

AFFIDAVIT AS TO UNDERTAKING

STATE OF OKLAHOMA, OKLAHOMA COUNTY, ss:

James E. Mason, being first duly sworn upon oath, says that he is a resident of Oklahoma County, State of Oklahoma, and that

(a) Neither he nor anyone for his use has been promised or has received any security or consideration for making this undertaking;

(b) He has received the sum of $— from ..... as consideration for making this undertaking;

(c) He has received the following described property or instrument from ——— as security for making this undertaking: ———

(d) Mr. Ervin Gilbert has promised to secure him for making this undertaking.

Maryland National Insurance Company
Bondsman (SEAL)
By /s/ James E Mason
Attorney-In-Fact

Subscribed and sworn to before me this 10 day of June, 1968.

/s/ Joyce Davis
Notary Public—Court Clerk

My Commission expires Feb. 14, 1972.

(Sec. 1322, Title 59, O.S.A.)

Power of Attorney
MARYLAND NATIONAL INSURANCE COMPANY
BOND OFFICE 3858 N. COLLEGE AVE. INDIANAPOLIS, IND. 46205

FOR RECOGNIZANCES AND BAIL BONDS ONLY

Power Amount
$5000.00

Power 769942

KNOW ALL MEN BY THESE PRESENTS, that the MARYLAND NATIONAL INSURANCE COMPANY, a corporation duly organized and existing under he laws of the State of Georgia, has constituted and appointed, and does hereby constitute and appoint,

its true and lawful Attorney-In-Fact, with full power and authority to sign the Company's name and affix its corporate seal to, and deliver on its behalf as surety, Recognizances, and Bail Bonds, and he execution of such obligations in pursuance of these presents shall be as binding upon the company as fully and to all intents and purposes as if done by the regularly elected officers of the said company at its home office in their own proper person; and the said company hereby ratifies and confirms all and whatsoever its said Attorney-In-Fact may lawfully do and perform in the premises by virtue of these presents.

This Power of Attorney is void if altered or erased. The obligation of the company shall not exceed the sum of FIVE THOUSAND ($5000.00) DOLLARS on any one Bond.

IN WITNESS WHEREOF, the said MARYLAND NATIONAL INSURANCE COMPANY, by virtue of authority conferred by its Board of Directors, has caused these presents to be sealed with its corporate seal and attested by its Resident Vice President this 10th day of January, 1967.

Amount of Bond $3000.00
Principal
or Defendant Erven Gilbert
Obligee
or Court JP B/O Dist City OKC
Agent James E. Mason
Form M-15

Offense Uttering
Date of
Execution June 10, 1968
Date of Appearance
or Accident
Rewrite No. 825458

(SEAL)
/s/ E. P. Goad
Resident Vice President

A separate Power of Attorney must be attached to each Bond executed.

I, DALE SMITH, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 11 day of Aug., 1969.

DALE SMITH, Court Clerk
By /s/ Harlan Smith, Deputy

FILED IN DISTRICT COURT
Oklahoma County, Okla.
JUN 21 1968
DALE SMITH, Court Clerk
By /s/ W. H. Regean, Deputy

Exhibit "C"

JOE B. HUNT
Insurance Commissioner

(SEAL)
STATE OF OKLAHOMA
Will Rogers Memorial Office Building
OKLAHOMA CITY, OKLAHOMA
October 9, 1968

Maryland National Ins. Co.
3858 N. College Avenue
Indianapolis, Indiana
63152

Mr. James E. Mason
509 Robert S. Kerr Ave.
Oklahoma City, Okla.
63158

NQTICE

You are hereby notified that a forefeiture has been declared in the District Court of Oklahoma County in the case of State of Oklahoma v. Ervin Merle Gilbert, No. 34516.

Pursuant to the provisions of 59 O.S. 1965 Supp. Section 1330, you are required to deposit with the Insurance Commissioner's office on or before November 9, 1968, the amount of $3,000.00. if said deposit is not made within the prescribed time, your license to do business is subject to cancellation.

Enclosed you will find a copy of the certified order declaring forfeiture.

JOE B. HUNT
INSURANCE COMMISSIONER
/s/ David Rolle
DAVID ROLLE
General Counsel

FORM No. BB9